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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1951

NO.....

PINKNEY HESTER ICENHOUR,

Petitioner and Appellant below,

VS.

UNITED STATES OF AMERICA, **Respondent and Appellee below,**

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, PINKNEY HESTER ICENHOUR, respectfully shows:

I.

STATEMENT OF MATTER INVOLVED

Petitioner was indicted in the Augusta Division of the United States Court for the Southern District of Georgia, along with William Frederick Icenhour, George Ray Icenhour and Cliatt F. Morris, jointly charging each defendant: (R-2,3,4,5)

(1) Having in his possession and custody, and under his control, an unregistered distillery (Sec. 2810 I. R. C.);

(2) Carrying on the business of a distiller without giving the required bond (Sec 2833 I. R. C.);

(3) Carrying on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him (Sec. 2833a, I. R. C.);

(4) Working at said distillery whereupon the required sign "Registered distillery" had not been posted (Sec. 2831, I.R.C.);

(5) Possession of a quantity of non-tax-paid distilled spirits (Sec. 2803a, I. R. C.);
to which all defendants pleaded not guilty. (R-5).

The trial jury found appellant and William Frederick Icenhour guilty on all counts save Count Four; defendant Cliatt F. Morris guilty of Count Four only (R.5).

Motion for acquittal was made by the Government in behalf of defendant, George Ray Icenhour. (R-56).

Appellant, Pinkney Hester Icenhour, appealed his conviction to the Circuit Court of Appeals for the Fifth Circuit and his appeal was heard by Circuit Judges Hutchinson, Holmes and Russell and affirmed. (Opinion R. 67-68).

This court on January 2, 1951, entered the following order:

> 'PER CURIAM: The petition for writ of certeriorari is granted. The Government having conceded that petitioner moved for an instructed verdict, the judgment of the Court of Appeals is vacated and the case is remanded to that court for further consideration.'

On March 20th, 1951 the said Circuit Court of Appeals again affirmed appellant's conviction on all counts. (R-67-70)

STATEMENT OF FACTS

On March 31, 1949 at approximately three o'clock in the afternoon six officers of the law were searching for a still about five miles from Appling, Georgia in Columbia County. They came upon a road that lead off of a public road and ran through Cliatt Morris' yard and within twenty-five yards of his house that went down back of his house and had fresh automobile tracks and foot tracks in it. They followed that road down until they came in sight of a still that was in full operation about seventy-five yards from them. They saw four or five men moving around in the still yard. The officers watched the still while it was in full operation and the four or five men moving

around the still yard for about five minutes. They were identified as being in the still yard and moving about the still, Cliatt Morris, William Frederick Icenhour and Pinkney Hester Icenhour but could not identify the other two men; these two men got away. The road the officers were following was the only road to the still. While the officers were watching the still, Cliatt Morris walked out in the direction of the officers and three of the officers went to arrest him. The other officers raided the still. The men at the still started running. William Frederick Icenhour was caught by one o fthe officers and Pinkney Hester Icenhour by one of the officers and each of them brought back into the still yard. One of the officers drove into the still yard with a 1939 Dodge pickup truck and had with him Cliatt Morris. When the said William was brought into the still yard he did not have any shoes on and was in his stocking feet. He inquired "Where is my shoes?" There was a pair of shoes lying within four feet of the still and one of the officers picked them up and said to William: "Here they are" and William put them on. Another officer pucked up an army jacket on a barrel in the still yard and said William said: "That is mine" and he put the Army jacket on. The officers with their prisoners then returned to Cliatt Morris' yard; returning by the same road they came down. William Icenhour inquired if he could drive home a 1941 Chevrolet car that was parked near the back steps of Cliatt Morris' house and said he had the keys to the car. William Icenhour was the son of Pinkney Hester Icenhour. (R.-52). Said William asked the officers if he could drive his truck home and when asked if he had the keys he said he did The officer seized the truck, which was the same 1939 Dodge truck that the officer had driven into the still yard above referred to and said William gave Mr. Finley, one of the officers, the key to the truck. (R-41). The road the officers went down started at the main road

and ran into and through the yard of Cliatt Morris and down into the woods. It was a regular road that vehicles could travel and there was no obstructions to the main entrance of it or in it. (R-14, 15). The distillery was approximately a 75 gallon distillery and approximately five hundred yards back of Cliatt Morris' house in some woods back there and at an old spring. The growth was reasonably thick. There were some big trees and bushes and thick growth around the spring. (R-27). One of the officers testified "I would say about 100 yards or maybe 200 yards from his house, (referring to Cliatt Morris' house) I saw Pinkney Icenhour's truck recognized it as his, parked on the still road. (R-24). "It had nothing in it to indicate that it had been used in connection with that distillery. Nothing but tires of the truck, the tire tracks fro mthe truck had come in the still yard several times". (R-33).

William Frederick Icenhour and Pinkney Hester Icenhour lived five or six miles from the still yard. (R-52).

Officer Charlie Tudor testified: "I saw Morris come around the still and stop in front of the distillery where whiskey was coming out and change jugs and looked directly towards us. Then he walked off towads us and he changed his course and went to the right". (R-38).

Neither of the officer witnesses testified to any act or conduct of Pinkney Hester Icenhour except that he was in the still yard and fled from it when the raid was made. Only three of the officer witnesses attempted to do so. Their respective attempts being:

Officer George Finley: "The still was in full operation and we saw four men working around the still". (R-12). "They were moving around the still yard en-

gaged in various activities". "They may have been moving around the distillery simply for the purpose of taking a drink for all we knew". (R-18). He did not see anything that appellant did on which to base the conclusion "working".

Officer P. A. Crawford: "I definitely did say I recognized Cliatt Morris, Pinkney Hester Icenhour and William Frederick Icenhour. I positively identified them working around the still and the two brothers got away". (R-24).

The Court inquired of this witness as to the expression "working" as follows:

The Court: Mr. Witness what definite work did you see P. H. Icenhour doing"?

The Witness. I would say he was there in the bunch. I could see them squatting around there.

The Court: What definite work did you see Pinkney Hester Icenhour doing?

The Witness: I couldn's swear what he had in his hand, but he was at the furnace. I couldn't swear just what he had in his hand, but I took for granted—

The Court: Not that—but could you swear he did any definite work at the still?

The Witness: No sir.

The Court: Could you swear that Cliatt Morris did any definite work?

The Witness: No, Sir.

The Court: Could you swear that William Frederick Icenhour did any work at the still?
The Witness: No Sir.

The Court: You saw all of them moving around the still yard was all?

The Witness: Yes, Sir.

(R-34-35)

Officer Charlie Tudor: "I could not say, of course, just what any particular one was doing. I saw them working around the still". (R-43).

The Court as to the expression "working" asked the following questions of this witness: Just tell me what specific work you saw Pinkney Icenhour doing?

The Witness: Judge, I didn't recognize him off that distance, but I saw a man about his size under the still.

The Court: Who was it?

The Witness: I coudn't say.

The Court: What did you see William Frederick Icenhour doing? What specific work did you see him doing?

The Witness: The same way with the old gentleman, I couldn't tell.

The Court: Tell what specific work you saw him doing around the still?

The Witness: I couldn't recognize either one from

that distance.

The Court: How about Morris?

The Witness: I did recognize Morris.

The Court: What did you see him doing?

The Witness: He came around in front of the still and changed buckets that the ywere catching whiskey in and then he stood up.
The Court: All I want to find out is what specific work you saw him doing? Did you see him put any wood under the fire?

The Witness: No, Sir.

The Court: Did you see him do anything about the liquor?

The Witness: That was all I could swear I saw him do. (R-44,45).

This witness testified: "I saw them firing the still". (R-47).

The Court as to this expression inquired of the witness and commented as follows:
The Court: What?

The Witness: Putting wood under the still, firing it.

Q. How soon after you saw them putting wood under the distillery before you saw any of the defendants?

A. Well—

The Court: (Interposing). Which one of the de-

fendants did you see putting wood under the fire?

The Witness: I couldn't say.

The Court: Well, you can't identify people like that. I can't let a case like this go to the jury. The Circuit Court of Appeals have held that you have got to prove they were working at the still. I don't see any use wasting time if you can't prove that any one or all of them were actually doing some work at the still. If you can prove that any one of the defendant's did any work I will let it go to the jury on that. I don't see where you have introduced any evidence whatever that either one of the defendants actually working at the still. (R-47-48).

Petitioner respectfully contends:

(1) The verdict of the jury and the judgment of the trial court finding him guilty of counts one, two, three and five are wholly unsupported by any evidence and his conviction on each of said counts respectively is wholly unsupported by any evidence. (R-pp 11-55, both inclusive).

(2) The judgment of the Circuit Court of Appeals affirming appellant's conviction is error and should be reversed. (R-67-70).

(3) The only evidence, of probative value, of appellant having any connection with the still or the liquor is "he was seen in the still yard where seven gallons of untaxed liquor was, while the still was in operation and when the officers raided he fled from the yard". The evidence or probative value against him was wholly circumstantial and insufficient to exclude every other reasonable hypothesis save that of guilt of the accused of (1) unlawfully possessing a still; (2) carrying

on the business of a distiller without giving bond; (3) carrying on that business with intent to defraud the United States of tax; and, (4) possessing distilled spirits in containers not having tax paid stamps affixed.

II

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13th., 1925 (Section 347, Title 28 U. S. C. A.).

On the 18th day of April, 1951 within thirty days from the entry of said judgment this petition for a writ of certiorari is filed

III.

QUESTIONS PRESENTED

(1) There is no evidence that the accused committed the crime or any one of them charged against him, and while the crimes charged were committed the evidence does not establish, as a matter of law, that appellant committed the crimes or any one of them.

(2) Each of the four offenses charged against appellant is a separate offense under the statutes. To prove either of the four offenses it was necessary for the Government to establish each offense by evidence pointing directly to the conduct of appellant within the narrow margin which the statute defines in each instance. There is a complete absence of any evidence that appellant did engage in the conduct specifically prohibited by the statutes or aided or abetted such conduct and, therefore, as a matter of law, he is not guilty

of any of the crimes charged against him.

(3) As a matter of law the Government's evidence and testimony only raises a suspicion of guilt of appellant. This suspicion is based only upon the presence of appellant at the still and his flight.

(4) A conclusion or opinion testified to by a witness, such as the conclusion or opinion of "working", testified to by three Government witnesses in this case (R-12,18,24,34,35,43,44 and 45), should as a matter of law be disregarded as evidence where the witness grounded such conclusion on no facts known to him or proven by him, and such conclusion is in direct conflict with facts testified to by him that show positively and admittedly by the witness when questioned by the trial Judge that the conclusion drawn was based on no facts known to him.

(5) The testimony of each of the three officers, Finley, (R-11-22). Crawford (R-23-37) and Tudor (R-37-48), who gave his opinion that appellant was "working" and each gave his conclusion that appellant was "working" is as a matter of law without probative value and should not be accepted to supply evidence of such acts and conduct of appellant as are necessary to constitute the crime charged or any one of them.

(6) The opinion of the Circuit Court of Appeals is grounded on its findings from the testimony of "Three witnesses for the government positively identified appellant as present in the still yard and moving about the still doing some kind of work there. While they were unable to particularly designate the precise work he was doing, they were not shaken in their belief and testimony that he was moving about the still and, as they put it, working there. The time was three o'clock in the afternoon, and there was no evidence

whatever that anything interferred with their seeing and identifying the appellant. They testified, too, that when the presence of the officers became known, appellant left the still in headlong flight." (The three witnesses referred to being Officer Witnesses Crawford, Finley and Tudor). This opinion is error in that said court accepted as being of probative value and as proof of "working" the opinion or conclusion of the witnesses referred to, as legal proof of acts and conduct of appellant as were necessary to constitute the crime charged, when as a matter of law such conclusions and opinions have no probative value when not supported by evidence of acts and conduct as are necessary to constitute the crime of "working" at a still.

(7) The opinion of the Circuit Court of Appeals is error as it finds: "The evidence standing thus, with these highly incriminating facts positively established against him by the government's evidence, appellant offered no testimony in explanation of, or excuse for, his presence at, and his flight from the still in anywise inconsistent with his innocence. (Underscoring mine). Indeed, he chose to rely on the presumption of innocence and his insistence made below, that, unexplained as they were, these facts were not sufficient to support a verdict of guilty." One of the "incriminating facts" referred to in the above quoted opinion of the court is that of "working", when as a matter of law there is no evidence of probative value on which to base the finding of appellant "working" at the still. When from the "highly incriminating facts" referred to in the quoted findings of the Circuit Court there is removed appellant "working" at the still, there remains included in the term "highly incriminating facts" only appellant's presence at the still and his flight and these two facts are insufficient as a matter of law to support appellant's conviction of any count charged.

(8) The evidence of any probative value proved only appellant's presence at the still and he fled and the officers raided and such evidence does not "point unerringly" to appellant's participation and control of the operation of the still, nor of his ownership of the liquor ad still, and hence the law requires of appellant no explanation of such facts as they taken alone or together are not incirminating facts. The failure of appellant to explain these facts or to testify in his own behalf should not have been considered by the Circuit Court of Appeals in its judgment and by so doing it committed error.

IV.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The Circuit Court of Appeals for the Fifth Circuit (Ga.) committed error:

(1) In affirming the judgment of conviction of appellant on each count and any count and on each count, in that justice requires a reversal of the judgment for the reason that the evidence of probative value was insufficient to support a conviction of appellant on any one of the counts.

(2) In finding, as a matter of law, that the repective conclusions or opinion of the officer witnesses Finley (R-11-22) as to "working", Crawford (R-23-37) as to "working", and Tudor (R-37-48) as to "working" was of probative value and established as a fact that appellant was "working" at the still and established as a fact appellant having possession and custody of the still and established as a fact appellant having possession of the illicit whiskey and established as a fact he assisted

in carrying on the business of distilling without having given the required bond and with intent to defraud the United States of taxes. The appellant court erroneously concluded that the opinion and conclusions of these witnesses "points unerringly to appellant's guilty presence at and participation in control and operation of, a still".

(3) In affirming appellant's conviction on evidence showing, as a matter of law when the evidence is sifted down to probative value, only appellant's presence at a still and flight on the approach of the officers, because appellant made no explanations and did not testify. (The opinions nd conclusions respectively of the officer witnesses Finley, Crawford and Tudor, are not supported by any facts of any acts or doings of appellant committing a crime).

WHEREFORE, your petitioner prays that a Writ of Certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit in this case numbered and entitled on its docket as follows: No. 13051, Pinkney Hester Icenhour, Appellant vs. United States of America, Appellee, to the end that said case may be reviewed and determined by this court and the said judgment of said Court of Appeals be reversed and set aside by this court. Dated this 18th day of April, 1951.

PINKNEY HESTER ICENHOUR

BY FRANKLIN H. PIERCE

BY W. D. LANIER

Attorneys for Appellant

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF COURT BELOW.

The opinion of the Circuit Court of Appeals for the Fifth Circuit appears in full in the record. (R-67-68). Said case has not been reported in the advance sheets of the Federal Reporter, 2nd. Series as yet.

II.

JURISDICTION

The jurisdictional statement will be found in the petition for Writ of Certiorari and is incorported here by reference.

III.

STATEMENT OF CASE

So far as is material to the questions here presented the statement of the case will be found in the petition for Writ of Certiorari under "Statement of Matter Involved" and is incorporated here by reference.

IV.

SPECIFICATIONS OF ERROR

(1) The Circuit Court of Appeals for Fifth Circuit erred in holding the conviction of petitioner should be affirmed.

(2) The Circuit Court of Appeals for the Fifth

Circuit committed error in affirming the judgment of conviction of appellant on each and every count, in that justice required a reversal of the judgment for the reason that the evidence was insufficient to support the conviction of appellant on any one of the counts.

(3) The Circuit Court of Appeals for the Fifth Circuit committed erro rin not reversing the judgment convicting the appellant on each of said counts for the reason it was its duty to reverse the judgment.

V.

ARGUMENT

APPELLANT'S CONVICTION ON ANY OF THE FOUR COUNTS WAS WHOLLY UNSUPPORTED BY ANY EVIDENCE AND MANIFESTILY UNJUST AND SHOULD HAVE BEEN REVERSED.

(a) The respective conclusions, or opinions of each of the Government witnesses, Finley (R-18) Crawford (R-31-34,35), and Tudor (R-43,44,45) that appellant was "working" at the still was not in either instance supported by any evidence of acts or conduct of appellant as are necessary to constitute the crimes charged or any one of them, and such conclusions or opinions, are unsupported by any facts and without probative value. The mere opinion or conclusion of a non-expert, without more, is without probative value. 23 C. J. Secundum, Page 114. Ashley vs. State, 97 S.E. 82, 27 Ga. App. 626. State vs. Carricut, 102 Southern 98, 167 La. 140. The conclusion of an ordinary witness cannot supply lack of evidence of such acts and conduct as are necessary to consittute the crime charged. 23 C. J. Secundum, page 114. Schwyart vs. U. S. C. C. A. Pa.

26 F. 2d 1; Hicks vs. State, 128 So. 115, 22 Ala. App. 507; King vs. State, 136 S.E. 466, 36 Ga. App. 272; Miller vs. State, 128 S.E. 588, 34 Ga. App. 140; Stromberg vs. Judge of Court of Common Pleas of Camden County, 193 A. 540, 118 N.J. Law 387; People vs. Laude, 143 N.Y.S. 156, 81 Misc. 256; Belief of witness is insufficient basis of verdict, Boutcher vs. State, 95 So. 561, 19 Ala. App. 134; Use of mail is not sufficiently shown by opinions. Mackett vs. U.S.C.C.A., Wis. 90 F. 2d 462, Passley vs. State, 8 S. E.(2) 131, 62 Ga. Appeals 88; Murray vs. State 39 S.E. 2nd. 842, 201 Ga. 201. "The belief of a witness cannot supply the place of substantive material facts". Griffin vs. State, 2nd. Ga. App. 534.

Under the rules of law cited the conclusions by each of the witnesses have no probative value. The conclusion of each of these witnesses that appellant was "working", even if acceptable as a matter of law, was proved erroneously by the witnesses' own testimony. The jury found the defendant not guilty of "working" at the still. This court will certainly not disregard the verdict of the jury finding against the conclusion and opinion of each of the witnesses, Finley, (R-11-22), Crawford (R-23-37), and Tudor (R-37-48) of appellant "working" at the distillery. Appellant being found by the jury, who heard the three witnesses referred to (being the same witnesses the Circuit Court of Appeals referred to as supporting its findings that appellant was "working" at the still (R-67-70), not guilty, leaves nothing in th eevidence to even remotely connect the appellant with the still or with any of the crimes charged against him, except his presence at the still and flight.

(b) Evidence which merely raised suspicion that all men on premises when officers entered possessed unregistred still there, but which did not distinguish

one from another in respect of ownership was insufficient to sustain conviction for possessing an unregistered still. U.S. vs. DeVito C.C.A., N.Y. 1934, 68 Fed, 2nd. 837. The presence of defendants while the distillery was in operation is merely a circumstance to show their connection with it and will not alone justify a conviction. U.S. vs. Dobbs, D:C.; Miss. 1871, Fed. Case No. 13,972. Reavis vs. U.S.C.C.A., Okla, 1938, 93F. 307. Evidence that a defendant was at or near an illicit still will not in itself justify a conviction. Grunwald vs. U.S.C.A., N.J. 1938, 94 F. 2nd. 952. Certiorari denied 58 S. Ct. 830. 303 U.S. 663. Flight or attempted flight of accused before arrest, taken alone, does not raise a legal presumption of guilt. 22 C. J. Secundum, par. 598, page 915. Cannon vs. U.S.C.C. A.S.D., 66 F. 2d 13; People vs. Herbert, 196 N.E. 821, 361 Ill. 64; State vs. Rodriguez, 147 F. 426, 23 N. M. L. R.A. 1918 A. 1916; State vs. Payne, 197 S.E. 573, 213 N.C. 713; Edigner vs. State, 12 Ohio, App, 263; Jenkins vs. Commonwealth, 111 S.E. 101, 132 Va. 692, 25; A.L. R. 882.

"The principle announced in Hicks vs. U.S. 150 U.S. 442, 450, 14 S. Ct. 144, 37 L. Ed. 1137, is pecularily applicable here. Hicks was at the scene where Rowe shot and killed Colvard and immediately before the shot was fired, Hicks told Calvard to take off his hat and die like a man. Both Rowe and Hicks fled from the scene. It is true that Hicks testified that he was trying to make peace between the two. The trial judg einstructed the jury that if Hicks was present for the purpose of aiding or abetting Rowe, he would be guilty although he did not render aid. The court held the instruction erroneous for the

> reason that there were no facts shown in the evidence of any previous conspiracy or arrangements on which to base the instruction. Mere presence at a place where crime is committed is not enough. Proof must warrant an inference of participation in the crime before the guilt can be found."

Hicks vs. U.S. 150 U.S. 442,

(c) Each of the offenses charged against appellant was a separate offense. Sec. 2810, I.R.C. Sec. 2833 (a) I.R.C. Sec. 2803 (a) I.R.C. There is no evidence that the accused committed the crime or any any one of them charged against him. While the crimes charged were committed, the evidence does not establish that appellant committed the crimes or any one of them. "Corpus deliciti must be established beyond a reasonable doubt." 23 C. J. Secundum, par. 917, page 186, and citations thereunder, including U.S. vs. Reavis, 93 F. 2d, 307.

> "The circumstances relied on to establish the corpus deliciti must be more than enough to raise a mere conjection or suspicion." 23 C. J. Secundum, par. 917, page 186 and citations thereunder.

> "The essential element of the crimes cannot be presumed or left to inference or conjecture and to justify a conviction evidence must establish each essential element of the offense charged." 23 C. J. Secundum, par. 918, at page 187, and citations thereunder including Boatright vs. U.S. 105 F. 2nd. 737

> "The testimony to prove either of the charged offenses must point directly to the conduct within the narrow margin which the statute defines and one who neither engages in the conduct specifically prohibited nor aids nor abets it does not violate the statutes"
>
> Bozza vs. U.S. 330 U.S. 160, 67 S. Ct. 645.

(d) There is not sufficient evidence to support the conviction of appellant on any one of the four counts herein at issue and error is apparent therefore, it became the duty of the Circuit Court of Appeals to reverse the judgment of conviction and it erred in not doing so. Wilbory vs. U.S. 163, U:S. 632. 16 S. Ct. 1127, 1197; Hemphill vs. U.S. 312 U.S. 657, 61 S. Ct. 729; Sherwin vs. U.S. 312 U.S: 654, 61 S. Ct. 618; Sheridan vs. U.S. 312 U.S. 654, 61 S. Ct. 619.

(e) The failure of appellant to testify does not constitute evidence against him, nor warrant an inference of guilt inasmuch as no facts were established against appellant, except that he was present at a still and in the still yard was seven gallons of liquor and he fled when the officers charged. It is now and always has been, as a matter of law, appellant's privilege not to voluntarily testify in his own behalf, nor is he called on as a matter of law to explain to a jury or to a court in this country, nor to anyone else facts that do not constitute a crime. 28 U.S.C.A: par: 632, now 18 U.S:C. A., par. 3481.

> "The failure of accused to testify may not be the subject of comment against him. Milton vs. U.S. 1940, 110 F. 2d. 556, 71 App. D.C. 394."
>
> "A defendant failing to testify is protected

> from unfavorable comment on his silence by court or counsel, unless he voluntarily becomes a witness and testifies on his own behalf to the merits, or to material part of merits."
>
> "In prosecution for violating Mann Act former sections 398 and 399 of this title, failure of defendant to testify could not be taken against defendant. Duarte vs. U. S.C.A. Tex. 1949, 171 F. 2d. 971.
>
> "Inference of guilt from accused's failure to testify in his own behalf is never permissible. Bradford vs. U.S.C.C:A. La. 1942, 130 F. 2d. 630, certiorari dened 63 S. Ct. 205, 317, U.S. 683, 87 L. Ed. 547.

The appellant court in its opinion held against the appellant and gave as one of its reasons for doing so that appellant did not testify in his own behalf.

The appellant court in support of its opinion cited Nounes vs. U.S. (5th. Circ. 4 Fed. 2nd 833, and Harding vs. U.S., 4th. Cir: 182 F. (2) 524. Taking these up in their reverse order, the case of Harding is by a divided Bench and the facts therein are materially different from the facts in appellant's case. This court's attention is called to the further dissenting opinion of Justice Hayes in this case. The facts in that case were Harding was at the still around 6:30 in the afternoon, after a hard day's work and the still was a considerable distance from his home and from his work and the still had just started operation. He had travelled a considerable distance after a hard day's work to reach the still at the hour stated, 6:30 (whether it was night at 6:30 when he reached the still was not disclosed by the record). The facts in appellant's case is the raid

took place at three o'clock in the afternoon and though the five officers stood in 75 to 100 yards of the still, with no obstruction to their view of the still yard and positively identified appellant at the still, none of the five officers testified to anything he did at the stll they only saw him hanging around the still. Certainly these officers had every opportunity and sufficient length of time—five minutes unobstructed view — to see any act or conduct on the part of the appellant, that constituted "working" at the still. The facts in appellant's case further show his two sons were at the still and it is an unfair and unAmerican assumption to assume that this father, appellant, had gone to the still other than to persuade his sons to desist in the violation of the law. The Harding case is in conflict with the case of Cannon vs. U.S. 66 F. 2nd. 13. The case of Nounes vs. U.S. is no support for the appellant court's findings in this case, for the defendant, Nounes, was charged with an offense under section 593 (b) of the Tariff Act of 1922. Said section 593 (b) provides "that the **unexplained** possession of goods unlawfully imported is sufficient evidence to authorize a conviction. Considering the presumption created by the Statutes, the evidence before the jury was sufficient to support the verdict **in the absence of reasonable explanation** on behalf of the defendant". (Underscoring mine).

The evidence is insufficient to sustain appellant's conviction on Count One for having possession and custody of the still, Counts Two and Three, that he worked or assisted in making or the possession of a distillery without giving the required bond and with the intent to defraud the United States of taxes, or on Count Five, charging possession of illicit whiskey, and the opinion of the Circuit Court of Appeals should be reversed. Bozza vs. U.S. 330 U.S., 160, 163, 164.

It is most respectfully submitted, therefore, that

this case is one calling for the exercise of this court's power of supervision by granting the Writ of Certiorari and reviewing and reversing the decision of the Honorable United State Circuit Court of Appeals for the Fifth Circuit.

Respectfully submitted:

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FRANKLIN H. PIERCE

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W. D. LANIER

ATTORNEYS FOR APPELLANT

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 681

PINKNEY HESTER ICENHOUR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Southern District of Georgia on four counts of an indictment which charged him with having in his possession and custody an unregistered still, carrying on the business of a distiller without having given bond as required by law, carrying on that business with the intent to defraud the United States of taxes, and unlawfully possessing distilled spirits which did not bear tax-paid stamps. The Court of Appeals, on October 16, 1950, affirmed the conviction, stating that (R. 67;[1] 184 F. 2d 574)—

[1] The first sheet of the proceedings after the remand by this Court (*infra*) is numbered the same (66 and 67) as the last sheet of the prior proceedings.

> * * * defendant is here insisting that the verdict is wholly unsupported by evidence.
>
> The United States, calling our attention to the fact that the defendant failed to move for an instructed verdict, insists that this is not a case where justice requires a reversal notwithstanding such failure.
>
> We agree. * * *

Following that decision, petitioner filed a petition for a writ of certiorari (No. 406, O. T. 1950), his contention being that the evidence was insufficient to support the conviction. Petitioner also asserted that the Court of Appeals erroneously stated that he had failed to move for an instructed verdict. We agreed with petitioner that the import of his counsel's motion at the close of the Government's case was a request for an acquittal (Brief in Opposition, pp. 6–7, fn. 2). This Court, stating that the "Government having conceded that petitioner moved for an instructed verdict," granted the petition, vacated the judgment of the Court of Appeals, and remanded the case to that court for further consideration. 340 U. S. 908.

On the remand, the Court of Appeals reviewed the evidence, found it sufficient to support petitioner's conviction, and again affirmed (R. 67–69).

Petitioner again contends, as in his prior petition, that the evidence is insufficient to sustain his conviction. We therefore invite attention to

our brief in opposition to that petition, where we summarized the evidence and showed that it amply supports the conviction. Now that the Court of Appeals has reviewed the sufficiency of the evidence and held that the trial court was right in submitting the case to the jury (R. 69), we submit that there is no occasion for further review.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

MAY 1951.

U. S. GOVERNMENT PRINTING OFFICE: 1951